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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 882

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA,

Petitioner,

vs.

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR RESPONDENT.

M. J. YEOMANS,
Attorney General of the State of Georgia.
MARION SMITH,
Special Assistant Attorney General, State of Georgia.
M. E. KILPATRICK,
Special Assistant Attorney General, State of Georgia.
HAMILTON LOKEY,
Special Assistant Attorney General, State of Georgia.

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REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA.

REPLY BRIEF FOR RESPONDENT.

Under Procedure Suggested by Petitioner Respondent Without Adequate Remedy at Law by Refusing to Collect Tax.

At the time of filing our original brief we had supposed it necessary to point out at some length why the respondent could not follow the supposed remedy of collecting the tax and paying it into the treasury and filing suit for a refund. It is apparent now from the brief of the petitioner that the Government does not claim that any such remedy could be followed, but on the contrary agrees that if respondent collected the tax and paid it in it would be without standing to question its validity.

The claim advanced, however, as to the method which respondent, it is said, could pursue, is predicated on the proposition that respondent must refuse all compliance with the statute if it wishes to question the validity of the exaction. The plan which the brief of petitioner suggests could be followed is set out on page 39 of that brief. It involves the following steps: (1) A refusal to collect the tax; (2) if an assessment is, nevertheless, made against petitioner, then the paying of the tax by petitioner; and (3) suing for a refund upon the ground that petitioner had not collected the tax. Such procedure does not afford an adequate remedy for two reasons:

(1) It would expose State officials, their agents and representatives to the risk of grave criminal penalties should their position not be sustained; and

(2) The procedure suggested would not make it possible to raise in that procedure the constitutional question now before the Court.

As to the first of these objections, attention is called to pages 39 and 40 of our brief, in which we point out the penalties to which the State officials and their agents would be subjected should they be mistaken in their judgment on this constitutional question. They involve money penalties, misdemeanors, and felonies. It is submitted as practically self-evident that there must be some way whereby State officials, faced with a demand which they regard as unconstitutional, can assert their constitutional position in the appropriate court without subjecting themselves to such penalties and risks.

Even as to private individuals, equity grants relief from compliance with a statute attacked as unconstitutional where the penalties attached to testing the statute in any other way are so severe as to make such test otherwise

practically impossible. This has been the rule at least since *Ex parte Young*, 209 U. S. 123.

See also, *McFarland* v. *American Sugar Ref. Co.*, 241 U. S. 82.

In *Stafford* v. *Wallace*, 258 U. S. 495, the court said:

> "In each bill the averments are sufficient if the act be invalid, to show equitable grounds for injunction in the severe penalties incurred for failure to comply with the act before opportunity can be given to test its validity. Ex parte Young, 209 U. S. 123."

In the instant case the State authorities undertook to go as far as they could in preserving all rights of the Government under this statute should the position of the State authorities prove unfounded. They, in effect, did what this Court later ordered to be done as a condition of granting a remedy against a Federal tax in *Rickert Rice Mills, Inc.*, v. *Fontenot*, 297 U. S. 110, namely: They deposited a sum equal to the claimed tax in a special account for safekeeping, for the obvious purpose of protecting the rights of all parties pending a determination. They also placed upon the tickets a statement of the amount allocated as a tax in the event, but only in the event, the State's constitutional provision should not be sustained; and having done all of this voluntarily they then brought a suit in equity to restrain not only the immediate levies but the further enforcement of the tax pending a final determination.

Had they followed the plan outlined in the brief of opposing counsel, they would have been compelled to face the same issue as to the collections of every athletic contest held by them to which the tax could be applied. If they collected the tax and paid it in as to subsequent contests they could not recover it back, and each time a contest was held at which the tax was not collected and paid in they would expose themselves to a new set of penalties and crim-

inal prosecutions if their constitutional advice proved unsound.

It would, of course, consume some time for the test case which we have assumed to reach the Supreme Court of the United States for final determination. The magnitude of the penalties, including possible imprisonment, which could have accumulated in such a period would make the risk an impossible one and would in effect prohibit any such procedure being followed. It may be that Federal officials would not in such a situation have demanded the full penalties provided by law if they were successful in the test case. But even private individuals, under the principle of *Ex parte Young*, are not required to run any such risk; and surely it is wholly incompatible with the relationship between the States and the Federal Government to assert that State officials faced with an exaction by Federal officials, which they believed to be unconstitutional, cannot raise the question in any way except by facing a risk of this character.

Furthermore, a test case raised in the way suggested on page 39 of the opposing brief would not in fact raise the constitutional question at all. The procedure suggested as pointed out is to refuse to collect the tax and then to pay it over and sue for a refund. With reference to this the opposing brief says:

> "And in such actions they could have litigated the question whether, under the facts of the case, they had collected the tax or not. In such a suit a determination that they had not collected the tax would result in a judgment in their favor unless the Court determined a liability under Sec. 1114(d) for a penalty. In that event the opportunity would be afforded to raise the constitutional question."

It is quite true that the State officials in such suit could raise the contention that they had not collected the tax and

could, therefore, recover the tax. But it is not correct to say that the court in that suit could determine whether there was an offsetting liability for a penalty under Sec. 1114(d). The reason for this statement is that a suit against the Collector would, under familiar principles, be a personal suit in contemplation of law. In such a personal suit he would not have the right to off-set a penalty due the United States even in the same amount.

U. S. C. A., Title 26, Sec. 1645, sub-sec. (c) (R. S. 3214) provides:

> "All suits for fines, penalties, and forfeitures, when otherwise provided for, shall be brought in the name of the United States" etc.

Obviously, therefore, a liability to the United States could not be off-set by the Collector in a suit which, in contemplation of law, is a personal claim against him for his individual tort. Hence the suggested procedure would not in fact raise this constitutional question.

On the question of the remedy that the State of Georgia might have had, we therefore come to this final conclusion: Petitioner cannot suggest any remedy except one that would involve the grave penalties, etc., which we have pointed out, and even that remedy would not actually raise the constitutional question.

We have cited in the Brief heretofore filed the case of *Pennsylvania* v. *Fix., Collector,* 7 Fed. Sup. 729. This is the decision of a District Court on motion of the State of Pennsylvania to remand the case to the State Court where it was originally instituted, and the District Court on the motion to remand held that R. S. 3224 was inapplicable since an effort was involved whereby it was sought to tax the governmental function of a State.

We desire to call the Court's attention to the fact that in 79 F. (2d) 520, is found the report of the decision of the

Circuit Court of Appeals in the same case wherein the later decision of the District Court dismissing the suit on its merits was affirmed. Although not reported, the decision of the District Court, as stated by the Circuit Court of Appeals, was that the State in selling whiskey was not engaged in an essential governmental function and that R. S. 3224 was applicable. However, we do not understand the effect of the later decision of the Circuit Court of Appeals as detracting anything from the decision of the District Court on motion to remand, at a time when the District Court construed the activity of the State as being an essential governmental function. In other words, as long as the Court determined the activity to be essentially governmental, there was an exceptional circumstance, and R. S. 3224 would not apply, but after reaching the conclusion that the function was not governmental then R. S. 3224 would apply.

Respectfully submitted,

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